



Office of the City Manager

INFORMATION CALENDAR

July 13, 2004

To: Honorable Mayor and
Members of the City Council

From: Phil Kamlarz, City Manager

Subject: Impact Report: Public Tree Act of 2004

INTRODUCTION

On April 20, 2004, the City Council referred to the City Manager the text of a proposed initiative ordinance that has qualified for the November 2004 ballot that would create a Berkeley Tree Board and impose various other restrictions and mandates related to public trees and persons who work on them.

SUMMARY

The Berkeley Public Tree Act (BPTA) of 2004, a ballot measure proposed for the November 2004 General Election, would be a new City ordinance that does the following: defines standards for tree care and procedures for licensing persons who perform work on public trees; establishes a Tree Board; establishes a process for citizens performing tree maintenance work on public trees; mandates tree planting; assigns staff; and, sets criteria for the removal or alteration of public trees.

If approved by the voters, the Public Tree Act of 2004 and the establishment of a Tree Board would make the process of requesting tree maintenance services or developing property more cumbersome for community members requesting work or developing property where public trees might be impacted. Passage of the BPTA would result in annual costs of up to \$3250,000 to be taken annually from existing program funding in the Parks Recreation and Waterfront Department. Further, the initiative would prohibit many improvements in parks by virtue of the prohibition restriction on of installation of new hardscape. This could affect projects being done undertaken to improve accessibility or with projects such as like the City's recently completed Skate Park or the Straw Bale Nature Center Building at the Berkeley Marina. In addition, there would be significant limits on safety-related tree trimming/removal. The BPTA would also require annual planting of 480 public trees, regardless of need or cost, through 2020. Other aspects of the initiative ordinance would intrude on charter authority for the City Council and the City Manager.

CURRENT SITUATION AND ITS EFFECTS

The City of Berkeley already has the following regulations regarding public and private trees in Berkeley: the Tree Ordinance (BMC Section 12.44); the Solar Access and Views Ordinance

(BMC Section 12.45) that deal with disputes between neighbors regarding trees; a provision in the Building and Construction Section of the BMC (Section 19.76.220) that regulates public trees impacted by the construction or moving of buildings, and finally, the current moratorium on the removing of any Coastal Live Oak trees in the City. The City's Forestry staff already has comprehensive tree maintenance standards, and processes and procedures in place for evaluating trees for removal, notifying community members of a scheduled removal, and for residents to request maintenance work on public trees and tree planting on public lands.

Parks Recreation and Waterfront Department Operational Impacts

1. The proposed ordinance gives oversight authority to the Tree Board on all issues related to public trees and associated landscapes (Section 12.43.030). This feature of the proposed ordinance duplicates an already-existing City Commission. The Berkeley Municipal Code created the Parks and Recreation Commission to advise Council on recreation, parks, camps and public greenery (such as parks, green areas, trees, shrubs, landscaping, etc.) (BMC Section 3.26.030). This Commission has a long-standing Tree Subcommittee that meets regularly on these issues and brings them to the full Commission. Removing this function from the Parks and Recreation Commission reduces the cost-effectiveness of this Commission and the City staff that support it.
2. All removals of established public trees are prohibited, with certain exceptions for emergencies: The proposed ordinance will prohibit the cutting, topping, or removal of any public tree except for certain emergency conditions (Section 12.43.080). "Established public trees" are over ten years old and/or over six inches diameter at Breast Height (DBH). There are two exceptions: first, the City Council may adopt an ordinance to allow the removal of a specific tree for a specific reason, after which the Tree Board may grant or deny final approval (Section 12.43.080.E). Second, a City staff person (Police, Fire, or any other City Department) may determine that an emergency poses an immediate danger to life, health, safety, or property (Section 12.43.800.F). In this case, a report must be prepared within five days of the incident by said personnel.

The City currently maintains an inventory of 40,200 public trees. Each year, approximately 500 must be removed due to the natural aging process of the tree and how it affects the structural integrity of the tree. The City also plants approximately 500 new trees per year, as funding allows. Under the proposed ordinance, it could take approximately 2 months for the process to have Council adopt an ordinance and the Tree Board to approve the action. In most cases, trees marked for removal are taken out within a month. By increasing the approval time to a minimum of two months, this will greatly increase the City's potential liability from accidents.

Second, all staff that designate a tree for removal due to emergencies must prepare a report within five days. This requirement is to be placed on all City Public Safety staff (Police and Fire) as well as other City staff, which places an extra burden on these staff that are not trained arborists. In addition, all public utilities would be required to comply

(PG&E, SBC Pac Bell, EBMUD, Comcast Cable, etc.), which may violate state public utilities code that regulates these activities.

Third, the ordinance defines “cutting” as the removal of a leader or major branch (Section 12.43.150). This places all major tree maintenance work in the province of the tree removal processes describe here. In many cases, a cutting of a limb or branch from a tree can greatly improve its structural integrity and prevent a tree from being removed at a later date. This is a substantive issue as it demonstrates how broadly the measure could be applied to any number of typical prevention operations currently in place to improve the health of Berkeley’s tree-stock.

3. Consent from Tree Board for any City project involving public trees: The proposed ordinance requires that any proposed work done by the City regarding any public tree be subject to additional consent from the Tree Board (Section 12.43.140). This has significant implications for the Zoning Adjustments Board review of proposed City projects. Approval of City projects would take longer.
4. Prohibition on building new structures on City property: ~~The proposed ordinance states that no additional development may take place that covers City-owned green space with asphalt, concrete, or other material that blocks water from being absorbed by the ground (Section 12.43.120.A).~~ The proposed ordinance ~~it~~ would prohibit, subject to limited exceptions, additional coverage of open space in parks, squares or landscaping around City buildings with impervious material. (Section 12.43.120.A). It is unclear whether this prohibition would apply to ~~this provision would result in the prohibition of any new projects on City land!~~ Examples would include the new Straw Bale Building at the Nature Center in the Berkeley Marina; the new Skate Park at Harrison Park; the proposed new gymnasium at the Frances Albrier Community Center at San Pablo Park; the I-80 Bicycle Bridge and the Touch down Plaza project; and any proposed pathways for City parks (e.g., San Pablo Park paths project, the Bay Trail and Bay Trail Extension projects) and any new play structures with a non-permeable ground surface. ~~This provision clearly would limit the City’s ability to provide new programs to youth and residents using City property and hence at lower cost. The only exceptions to this provision involve projects that have been initiated through the ballot process.~~
5. Tree Impact Report: The proposed ordinance requires that any proposed development which may affect any City tree shall include a “tree impact report.” (Section 12.43.120.B).

This will add costs to all City projects that may affect trees. The ordinance does not provide for a process by which the tree report or the project itself gets approved or not. Along with a Tree Report, the Berkeley Tree Board may require a CEQA analysis, including an environmental impact report for City projects or any project involving a City tree. The proposed ordinance also grants power to the Tree Board to halt any City development project that violates the tree ordinance (Section 12.43.110.E.4.b).

6. Annual number of trees planted: The Tree Board requires that the City plant the same number of trees each year using 2003 as a baseline (Section 12.43.100.H). The annual

goal of planting 480 new trees as defined by 2003 levels is a wonderful idea. In fact, the City has averaged approximately 500 new trees per year over the last decade. By mandating a fixed number of new tree plantings per year, especially as the City goes into a period of significant budget reductions and staff cuts, the City would be pressured into using existing resources to plant new trees directly at the expense of addressing hazardous conditions developing within the current inventory of City trees. However, the priority for the City must be to monitor and maintain its current inventory of trees first, in order to prevent loss of life, damage to property, and injuries. Trees have numerous possibilities for trunk and branch failure and must be monitored regularly. The storm and high wind season each year often causes tree failures throughout the City. For example, the recent El Niño Storm years of the late 1990's brought several months of extensive storm damage to City trees per year, whereas this past year saw very few storms. The City must have the flexibility to deal with storm conditions that are far beyond its control. The City typically pays out damage claims caused by falling trees and branches in an amount that can range from \$10,000 to \$500,000 per year.

7. It creates authority to grant "tree work licenses" and issue "tree work permits": The Tree Board will have the power to create criteria for issuing tree work licenses, granting licenses, tracking licenses, and revoking licenses for persons working on public trees (Section 12.43.090). The cost of this provision can be covered by the two staff and supplies budget, however, other costs may arise in the administration of this process. This is significant duplication because the City already has standard requirements for all contractors that work on public trees (valid arborist license, valid contractors license, valid business license, valid insurance). The City already issues tree work permits at no charge. These permits contain requirements for acceptable methods of tree work. Simply put, this provision provides no additional benefit to the City or to public trees, while at the same time incurring certain administrative cost to run this licensing program for the board.
8. Hiring legal and technical experts for disputes and regular operations: Any differences in policy between the City's Parks, or any other City agency, and the Tree Board will be resolved by the City hiring legal and technical experts to explain things to the parties (Section 12.43.100.L). ~~The ordinance has the City will likely need to provide funds to enable the Tree Board to retain experts, including arborists independent legal counsel, landscape architects, scientists and other professionals personnel as deemed necessary to assist with -and resolve tree issues the Tree Board in its duties (Section 12.43.100L 140.E).~~ Several experts may have to be hired until various policy and operational issues and disputes are sorted through. After that, the high volume of permit and licensing applications will probably necessitate the use of outside consultants. Upwards of \$100,000 per year could be spent on outside experts for several years., including litigation costs.
9. It grants quasi-judicial powers and operational duties to a newly-created Tree Board, with the authority to do the following: direct and supervise City staff in policy and operational matters, to conduct inspections, hold hearings, issue subpoenas, and take sworn testimony. This board would have strong quasi-judicial powers and extensive operational

duties that include developing all policies and procedures related to the care of public trees and extensive enforcement actions against those who do not comply. Tree Board members, appointed by the Council and commissions and serving on a voluntary basis, would carry out these functions. The board members will not be City staff. The ordinance contains no criteria for qualifications to be appointed to the Board. Yet, the Board will have full authority to direct Parks Department staff in all matters relating to the maintenance of current inventory of City trees as well as the selection and planting of new trees and associated landscaping. Two other voter-approved commissions have a quasi-judicial mandate and operational duties: the Police Review Commission and the Fair Campaign Practices Commission.

10. Responsibility and control of public trees: The ordinance states that the City may not conduct any maintenance on public trees unless it submits a proposal and monthly work schedule to the Tree Board for approval (Section 12.43.100.C). This represents significant duplication because the Forestry Division of the City's Department of Parks Recreation & Waterfront already has policies and procedures for all existing and newly planted public trees in the City.
11. Guidelines for tree maintenance: The Tree Board will create guidelines for the trimming and pruning of all public trees that must be followed by anyone that works on public trees – including City staff, residents, and outside contractors, including all utilities (PG&E, SBC-Pac Bell, EBMUD, Comcast Cable, etc.) This is duplication because the City already has guidelines for these activities. In addition, this may conflict with PG&E guidelines that are regulated by the California Public Utilities Commission. The potential additional cost to the City is not yet determined. The City would only perform maintenance on public trees according to methods approved by the Tree Board and by submitting specific proposals that must be approved by the Tree Board. In addition, the City is to provide a monthly tree maintenance work schedule to allow monitoring by Tree Board members (Section 12.43.100.C). The City currently maintains 40,200 trees. Each year, approximately 500 trees are removed due to hazards and approximately the same number (500) is planted. This provision will introduce additional administrative work and delays in performing work, along with an additional, undetermined cost to the City.
12. Tree maintenance by concerned residents: The Tree Board may allow residents to perform maintenance on public trees. The Tree Board may require City staff to supervise this maintenance (Section 12.43.100.F). These provisions would require diversion of City staff from other City forestry work in order to supervise the maintenance work performed by residents who may be less experienced and will take more time to perform the work. Second, this creates liability for the City in that residents are not employees covered by City insurance.

Fire Department Operational Impacts

The ordinance grants broad regulatory power to a quasi-judicial board that will regulate virtually all activities around care, maintenance, trimming, topping, removing or planting of trees on public property. Nothing in the ordinance requires members of the Board to have any special

knowledge about trees or the activities this ordinance seeks to regulate. Except for a narrowly defined emergency exception, public safety officials are prohibited by the ordinance from performing their ordinary and necessary duties of enforcing fire safety regulations that require trimming of trees without approval of the Tree Board. The ordinance establishes a cumbersome, time consuming and expensive process that will negatively affect the ability of public safety personnel to perform routine and ordinary fire prevention work. Beyond this concern, two major issues stand out in relation to fire safety in the city.

The first issue is the affect upon the authority of the Fire Chief to enforce the Fire Code. The BMC and the Fire Code require the Fire Chief to enforce all laws and regulations necessary to protect lives and property from fire. The Fire Code contains provisions that specifically refer to trimming, pruning or otherwise altering the shape of trees to reduce the spread of fire in the hazardous hill area. These provisions apply to all trees, public or private. The ordinance in granting regulatory oversight to the Tree Board would place the authority of the Fire Chief in conflict with the Board's regulatory discretion. In affect, the Board would have power to override or circumvent the Fire Code. This seems to create a problem over which law or ordinance has precedence – the Fire Code or the Tree Ordinance.

The second issue also concerns fire safety. PG&E is required by the California Public Utilities Commission to trim trees that have power lines running through branches. The CPUC regulation is promulgated in General Order 95, under authority of the Public Resource Code Sections 4292-4296. The General Order applies to trees on public as well as private property.

The Tree Ordinance would restrict the ability of PG&E to perform this important public safety service. Tree branches in contact with power lines have been the cause of significant wildland fires in the past. Regular trimming and thinning of tree branches is necessary to prevent fire caused by arcing power lines. This ordinance seems to conflict with CPUC regulatory authority and state laws.

City Attorney Review of Proposed Initiative Ordinance

Many sections in the initiative are inconsistent with the legislative authority of the City Council as defined in the City Charter. Further, the BPTA 2004 also interferes with the City Manager's charter authority to administer City operations.

Section 12.43.060.H. would provide that the Mayor and members of the City Council shall each appoint a member to the Tree Board, consistent with the Fair Representation Ordinance. The initiative, however, goes on to state that four other members of the Tree Board shall be appointed by specified commissions; and, that if the Berkeley Unified School District agrees to comply with the ordinance, it may appoint 5 members as to represent each School Board director.~~a member as well.~~ The initiative also states that the Tree Board may fill its own vacancies. These provisions are in derogation of the City Council's charter authority, as the governing body of the City, to appoint commissions and fill vacancies.

1. Intrusion into Council Authority and Council/Manager form of Government

Numerous provisions of the ordinance would interfere with the Council's authority over City property. For instance the ordinance would authorize the Tree Board:

- or a subcommittee thereof, to conduct inspections of public trees (§12.43.060.F)
- to determine what types of trees may be planted (§12.43.060.G.5)
- to oversee planting and maintenance of public trees (§12.43.100)
- to raise and control funds outside the normal budget process and outside the Council's control (§12.43.070)
- to control removal of public trees and require restoration of removed public trees (§12.43.080 & 090; esp. §12.43.080.E)

The initiative would also delegate promulgation of licensing standards and licensing decisions themselves to the Tree Board (§12.43.090) rather than the Council, would require the Council to obtain permission from the tree Board to remove public trees ((§12.43.080.E), as well as change the manner in which the Council is required to act (i.e., passage of two ordinances to remove a public tree [§12.43.080.E]).

Other provisions intrude into or interfere with the City Manager's charter authority to administer City departments and personnel. For instance, the initiative would:

- specify the number of staff assigned to the Tree Board by the City Manager and give the Tree Board control over which staff are assigned to it (§12.43.100.G);
- mandate a specified number of trees that must be planted annually through 2020 (§12.43.100.H);
- limit the ability of City personnel to take emergency action to prune or remove trees (§12.43.080.F)

2. Invalid Delegation of Authority to Tree Board

The initiative also delegates broad authority to the Tree Board, without any standards for the exercise of that authority. Specifically, it delegates to the Tree Board the authority to remove a public tree if it determines that such removal is necessary (§12.43.080.D.).

However, the initiative does not explain or limit this discretion in any respect.

FISCAL IMPACTS OF POSSIBLE FUTURE ACTION

The cost of implementing the program required by this new ordinance is ~~a minimum of up to~~ \$3250,000 per year. Since the proposed ordinance requires that no new funds be allocated for this program, the \$3250,000 will have to be taken from another service provided by the Parks Recreation and Waterfront Department, such as programs for youth ~~or senior citizens~~.

The ordinance could also result in increased costs for projects affecting City trees, most of which are City projects, but homeowners and developers may also be affected if a City tree is potentially affected. In particular, staff estimates that zoning permit applications would increase by at least \$3,471 (which is the additional cost of a Tree Impact Report, a CEQA analysis including either an Environmental Impact Report, or a Mitigated Negative Declaration report, if

required). These costs may go up if the project is denied and the homeowner chooses to file an appeal at a cost of \$578 per appeal.

The Tree Board would require two City staff and administrative overhead (Section 12.43.100.G). This would comprise the following costs:

- Two FTE staff (\$100,000 each, including fringe);
- \$50,000 in overhead (office space/ computers and equipment/ supplies)
- Total direct cost: \$250,000

The Tree Board would have the City implement the proposed ordinance with existing resources only (Section 12.43.100.G). This provision will require the Department of Parks Recreation & Waterfront to divert two full-time staff from existing operations over to the program administration of the proposed ordinance. If taken from the Forestry Division, this will result in 20% less work performed on public trees which will increase significantly the dangers posed by structural failures in the City's inventory of trees. If taken from another division within the Parks Recreation and Waterfront Department, other programs will suffer, such as reductions in youth recreation ~~or~~ programs ~~for senior citizens~~.

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